Supreme Court, U.S.
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No. 87-1650

In The

Supreme Court of the United States

October Term, 1987

ROGER PHILIP BRANNON,

Appellant,

v.

CONNIE RANDMAA,

Appellee.

On Appeal From The Court of Appeals
For The Third Judicial District of Texas

MOTION TO DISMISS OR AFFIRM

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20 pp

QUESTIONS PRESENTED BY APPELLANT

1. Do the provisions of Sections 5.01 and 5.02 of the Texas Family Code (1975) and the provisions of the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Section 1408 (1983), as applied by the courts of Texas, violate the constitutional doctrine of separation of powers?

2. Does the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Section 1408 (1983), allow an unconstitutional retroactive application that destroys existing and vested rights?

3. What is the extent of the retroactive reach of the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Section 1408 (1983)?

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MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to U.S. Supreme Court Rule 16, Subsections (b), (c) and (d), moves the Court to dismiss the appeal on the following grounds:

(1) this appeal is not within this Court's jurisdiction under 28 U.S.C. 1257(2);

(2) it does not present a substantial federal question;

(3) it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument.

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OPINION BELOW

The Opinion of the Court of Appeals for the Third Supreme Judicial District of Texas is reported at 736 S.W.2d 175. The denial of review by the Texas Supreme Court was without opinion.

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STATEMENT OF THE CASE

Appellant and Appellee were married from July 4, 1964, until they were divorced by the Texas courts on December 16, 1977. During this marriage, Appellant served in the United States Air Force from September 30, 1964 until the parties' date of divorce; subsequently, Appellant retired from his military service on September 30, 1984, and Appellant began receiving his military retirement benefit payments on the last day of October, 1984.

On September 26, 1984, Appellee filed a suit in the Texas district court to partition the military retirement benefits. The partition was granted because the parties' divorce decree did not provide for the division of the military retirement benefit payments and because Texas law entitles Appellee to recover her share of these retirement benefit payments. The trial court's judgment in favor of Appellee was affirmed on August 12, 1987, by the Texas Court of Appeals in *Brannon v. Randmaa*, 736 S.W.2d 175 [opinion set forth in J.S., A-1]. On January 6, 1988, the Texas Supreme Court denied Appellant's application for writ of error after determining that Appellant's application presented no error of law which is of such importance as to require correction or reversal of the judgment of the Court of Appeals [J.S., A-12].

All of the military nondisability retirement benefit payments at issue in this case are payable after the February 1, 1983, effective date of the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Section 1408 (1983) (hereafter referred to as "USFSPA").

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SUMMARY OF ARGUMENT

I. This Court Lacks Jurisdiction Under 28 U.S.C. Section 1257(2).

II. The Questions Presented Are Unsubstantial and Were Correctly Decided Below.

BRIEF OF ARGUMENT

I. This Court Lacks Jurisdiction Under 28 U.S.C. Section 1257(2).

Appellant asserts jurisdiction under 28 U.S.C. Section 1257(2) by claiming that Texas community property statutes have been applied in a way repugnant to the laws of the United States as set forth in *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728 (1981).

Appellant's theory rests on two incorrect assumptions: (1) that the *McCarty* decision declared that the Appellant-servicemember's military retirement benefits are his separate property, and (2) that the *McCarty* decision in effect retroactively vested Appellant's rights to his military benefit payments.

Prior to the *McCarty* decision, Texas considered military retirement benefits to be divisible at time of divorce, *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970), or to be divisible subsequent to a divorce action by way of a partition suit, *Taggart v. Taggart*, 552 S.W.2d 422 (Tex. 1970).

The *McCarty* decision did not address the issue of whether military retirement benefits paid in a community property state would be characterized under such state's marital property laws as separate or community property. Instead, the Court held that military retirement benefits were not divisible upon divorce because of the federal preemption doctrine. The Court concluded that there was a conflict

between the terms of the federal retirement statutes as they then existed and state community property rights. *McCarty*, at 2741.

"Nothing in *McCarty* suggests that the Supreme Court therein intended to invalidate, or otherwise render unenforceable, prior valid and subsisting state court judgments. Absent some indication of such an intent, we decline to do so." *Erpsan v. Badgett*, 647 F.2d 550, reh. denied en banc, 659 F.2d 26, at 28 (5th Cir. 1981); *Wilson v. Wilson* 667 F.2d 497 (5th Cir. 1982), cert. denied, 102 S.Ct. 3485 (1982). The Texas Supreme Court agreed with the U.S. Fifth Circuit Court of Appeals in *Segrest v. Segrest*, 649 S.W.2d 610 (Tex. 1983). The *Segrest* opinion reviewed United States Supreme Court decisions from 1905 through 1982 and determined:

> None of the cases involving the question of federal law preemption of state community property law indicate an intent to invalidate or otherwise render unenforceable in retroactive fashion all prior valid and subsisting state court judgments. See *Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981); *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589; *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979); *Yiatchos v. Yiatchos*, 376 U.S. 306, 84 S.Ct. 742, 11 L.Ed.2d 724 (1964); *Free v. Bland*, 369 U.S. 663, 82 S.Ct. 1089, 8 L.Ed.2d 180 (1962); *Wissner v. Wissner*, 338 U.S. 655, 70 S.Ct. 398, 94 L.Ed.2d 424 (1950); *McCune v. Essig*, 199 U.S. 382, 26 S.Ct. 78, 50 L.Ed. 237 (1905).

Segrest, at 612. Further the Texas Supreme Court in *Segrest* applied this Court's *Chevron v. Huson* three-prong test for determining whether a judicially modified or abrogated rule of law, such as in *McCarty*, should be given retroactive operation. 404 U.S. 97, 92 S.Ct. 349 (1971). The conclusion

reached after applying the *Chevron* three-prong test was that *McCarty* did not retroactively alter prior state court judgments which divided military retirement benefits in divorce or partition suits. *Segrest*, at 612.

This Court stated in *McCarty* that "Congress may well decide . . . that more protection should be afforded the former spouse of a retired service member. This decision, however, is for Congress alone." *McCarty*, at 2743. By enacting the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Section 1408 (1983), the Congress did just that. Section 1408(c)(1) provides:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse *in accordance with the law of the jurisdiction of such court*. (Emphasis added.)

Thus, Congress returned to state courts that authority which *McCarty* had preempted them from exercising and thereby removed the conflict between state and federal laws which was the basis of the *McCarty* reasoning.

The jurisdictional basis asserted by Appellant in 28 U.S.C. Section 1257(2), namely, that Texas community property laws are repugnant to federal retirement laws, no longer exists. What is being assailed in this appeal is not a state statute, per 28 U.S.C. Section 1257(2), but a federal statute, the USFSPA. While Appellant also claims that the USFSPA is unconstitutional, that is not a basis for this Court's appellate jurisdiction of state court decisions under 28 U.S.C. 1257(2).

II. The Questions Presented Are Unsubstantial and Were Correctly Decided Below.

If the Texas Court of Appeals decision is reviewable at all, it is so only by the discretionary writ of certiorari, under 28 U.S.C. 1257(3) which the Appellant requests this Court to do (J.S., p.33). Appellant asserts that the USFSPA is unconstitutional and therefore, the Court of Appeals' decision, which was based in part on the effect of the USFSPA, is invalid. Further, Appellant claims that the constitutionality of the USFSPA is "an important question of federal law which has not been, but should be, settled by this Court" (J.S., p.24).[1] A review of this Court's summary disposition of cases since the passage of the USFSPA weakens Appellant's claims.

In the case of *Trahan v. Trahan*, 682 S.W.2d 332 (Tex. Civ. App.-Austin 1984, writ ref'd n.r.e.) federal questions were appealed concerning the constitutionality of the retroactive application of the USFSPA to pre-*McCarty* divorce decrees. Sec. 12 FLR 1152 (1986). This Court dismissed *Trahan* (No. 85-1050) for want of a substantial federal question at 106 S.Ct. 1171 (1986) and denied the petition for rehearing at 106 S.Ct. 1664 (1986); thus, the Texas court's decision that the USFSPA is to be applied retroactively to restore law to what it was prior to *McCarty*, and thus is not an unconstitutional garnishment of wages, was affirmed.

The case of *Powell v. Powell*, 703 S.W.2d 434 (Tex. App.-Waco 1985, writ ref'd n.r.e.) presented questions concerning the constitutionality of the USFSPA's retroactive removal of the *McCarty* preemption. Section 12 FLR 1276 (1986). On

[1] To Appellee's knowledge, Appellant has failed to comply with the requirements of Rule 28(b) and (c), U.S. Sup.Ct. Rules (1987), regarding service on the Solicitor General, Department of Justice, and the Texas Attorney General, of the initial papers filed in this proceeding wherein the constitutionality of an Act of Congress or State Statute is drawn into question.

June 11, 1986, this Court dismissed the *Powell* appeal (No. 85-1459) for want of a substantial federal question. 106 S.Ct. 2911 (1986).

Other similar summary dispositions of cases raising questions concerning the retroactive application of the USFSPA are *Wintriss v. Wintriss*, cert. denied, 107 S.Ct. 104 (1986), No. 85-2104, from the California Court of Appeals; *Thompson v. Thompson*, appeal dismissed for want of a substantial federal question, 107 S.Ct. 43 (1986), No. 86-122, from the California Court of Appeals; *Potter v. Abshire*, cert. denied and appeal dismissed for want of jurisdiction, 107 S.Ct. 1262 (1987), No. 86-568, 179 Cal. App.3d 73, 224 Cal. Rptr. 312 (1986); *Jett v. Jett*, 458 S.2d 473, appeal denied at 105 S.Ct. 2115 (1984), No. 84-1375.

The Texas Court of Appeals correctly took issue with Appellant's reliance upon U.S. Supreme Court case authority dated in the 1800s. (See, J.S., App. A-7, fn 1.) Appellant quotes dictum from *Ogden v. Blackledge*, 6 U.S. (2 Cranch) 272, 2 L.Ed. 276 (1802), "To declare that the law is, or has been is a judicial power; to declare what the law shall be, is legislative." Appellee agrees with this statement. The passage of the USFSPA declared what the law "shall be" as applied to this case which only involves military retirement payments paid after its effective date. The *McCarty* decision, while declaring what the law was at the time of its holding, did not declare its retroactive application to pre-*McCarty* marital property rights. *Ogden* involved a North Carolina law which retroactively changed that state's prior law covering timetables for creditors of a deceased to file claims. This case would not, today, present a federal question after *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

The Court below correctly held that the effect of the USFSPA was to reverse the effect of *McCarty* following *Cameron v. Cameron*, 642 S.W.2d 210 (Tex. 1982). Even the

legislative history of the USFSPA shows that Congress believed the Act would permit former military spouses, otherwise blocked by the *McCarty* decision, to return to state courts and obtain new decisions on division of military nondisability retirement benefits. This history of Congressional intent and action is highlighted in the following analysis of the above-quoted Section 1408(c)(1):

> The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of non-disability military retired or retainer pay. *The provision is intended to remove the federal pre-emption* found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisible. (Emphasis added.)

S. Rep. No. 97-502, 97th Cong., 2d Sess. 16, reprinted in 1982 U.S. Code Cong. & Admn. News 1611 (1983).

Other states' courts agree with Texas' courts interpretation of *McCarty* and the USFSPA. An overwhelming number of state courts have held that military nondisability retirement benefits are divisible just as they had been prior to the *McCarty* decision; constitutional arguments similar to those of Appellant have not been adopted in other states. See, *Chase v. Chase*, 662 P.2d 944, 946 (Alaska 1983) which held that the USFSPA is "remedial action by Congress" and "therefore, obviates *McCarty* and in turn becomes controlling under the Supremacy Clause"; *In re Marriage of An Kenman*, 142 Cal. App.3d 833, 191 Cal. Rptr. 292, 294 (Ct. App. 1983); *Griggs v. Griggs*, 107 Idaho 123, 686 P.2d 68, 71 (1984); *Walentowski v. Walentowski*, 100 N.M. 484, 672 P.2d 656, 659 (1983); *Bullock v. Bullock*, 354 N.W.2d 904, 908 (N.D. 1984); *In re*

Marriage of Smith, 100 Wash.2d 319, 669 P.2d 448, 450 (1983); *In re Marriage of Hopkins*, 142 Cal.App.3d 350, 191 Cal. Rptr. 70 (Ct. App. 1983); *DeGryse v. DeGryse*, 661 P.2d 185 (Ariz. St. Ct. 1983); *In re Smith*, 9 FLR 2705 (Wash S.Ct. 1983); *Castiglioni v. Castiglioni*, 10 FLR 1317 (N.J. Super. Ct. 1984); *Smith v. Smith*, 458 A.2d 811 (Del. Fam. Ct. 1983); *Coates v. Coates*, 650 S.W.2d 307 (Mo. App. 1983); *Brown v. Brown*, 279 S.C. 116, 302 S.E.2d 860, 861 (1983); *In re Marriage of Giroux*, 704 P.2d 160, 41 Wash. App. 315 (1985), *Edsall v. Superior Court*, 143 Ariz. 240, 693 P.2d 895 (1984).

Appellant also argues for the first time on this appeal that a partition action is not a "court order" under the USFSPA, a position contrary to the holdings in other Texas cases. See, *Trahan v. Trahan*, 882 S.W.2d 332 (Tex. App.-Austin 1984, writ ref'd n.r.e.); *Southern v. Glenn*, 677 S.W.2d 576 (Tex. App.-San Antonio 1984, writ ref'd n.r.e.); *Harrell v. Harrell*, 684 S.W.2d 118 (Tex. App.-Corpus Christi 1984) rev'd 692 S.W.2d 876 (Tex. 1985), on remand 700 S.W.2d 645 (Tex. App.-Corpus Christi 1985, no writ); and *Harkrider v. Morales*, 686 S.W.2d 712, 174 (Tex. App.-San Antonio 1985, no writ).

The theory of a partition action in the divorce context is that former spouses become tenants-in-common as to any assets not divided in their divorce decree. As tentants-in-common, they are entitled to seek a partition of their co-tenant estate. Partition affects the right to possession of property, not the ownership title of the property. The Court below correctly applied Texas state law in that the parties' divorce decree did not specifically divide the military retirement benefits, leaving such undisposed asset subject to a suit to partition. Thus, a partition judgment is a type of court order defined and described in 10 U.S.C. Section 1408(a)(2) as being a "final decree modifying the terms of a previously issued decree of divorce." A partition decree fills in the blanks, so to speak, of a divorce decree.

Therefore, Appellant's argument that his right to his military retirement benefits was vested in just him, by the *McCarty* decision, does not follow since both Appellant and Appellee held the benefits as tenants-in-common under Texas law from the time of their divorce.

Further, Appellant's argument that he was unconstitutionally divested by the USFSPA of rights "vested" by *McCarty* thus posing a federal question is "so attenuated and unsubstantial as to be absolutely devoid of merit" and thus does not meet the requirement of a substantial federal question. See, *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579; 24 S.Ct. 553, 557 (1904).

The Texas Court of Appeals in this case correctly stated that the Appellant "never acquired a vested, permanent right to sole enjoyment of his retirement benefits before Congress enacted the USFSPA." 736 S.W.2d 175, 178. Since 1882 federal case law has stated that a "pension granted by the government confers no right which cannot be revised, modified, or recalled by subsequent legislation. *U.S. Ex. Rel. Burnett v. Teller*, 107 U.S. 64, 2 S.Ct. 39, 27 L.Ed. 352 (1882)." *Stouper v. Jones*, 284 F.2d 240, 242 (D.C.C.A. 1960). See also, *Lynch v. U.S.*, 292 U.S. 71, 54 S.Ct. 840, 78 L.Ed. 434 (1934).

"The status of retirement for military personnel and the right to and the amount of retired and retirement pay are created and controlled by statute." *Abbott v. U.S.*, 287 F.2d 573, 576, 152 Ct.Cl. 798, 804, cert. denied 368 U.S. 915, 82 S.Ct. 192, 798, 7 L.Ed.2d 130 (1961); *Goodley v. U.S.*, 441 F.2d 1175, 1178 (Ct.Cl. 1971). A more recent federal decision expounding on the vesting issue of military retirement is *Costello v. U.S.*, 587 F.2d 424 (9th Cir. 1978) cert. denied 99 S.Ct. 2858, 442 U.S. 929, 61 L.Ed.2d 296. This case is about military personnel who retired before the effective date of 1963 statutory changes tying adjustment of retirement compensation to the cost of living index rather than to active duty pay scales. The retired

servicemen contended that they had a vested right to a particular computation of their retirement pay that was in effect at the time they retired and that the subsequent act unconstitutionally retroactively deprived them of that vested right.

At page 425 of the *Costello* opinion, the Court quotes the relevant U.S. Supreme Court precedent: "No one disputes that Congress may prospectively reduce pay of members of the armed forces, even if that reduction deprived members of benefits they had expected to be able to earn. Cf. *Bell v. U.S.*, 366 U.S. 393, 81 S.Ct. 1230, 6 L.Ed.2d 365 (1961); *U.S. v. Dickerson*, 310 U.S. 554, 60 S.Ct. 1034, 84 L.Ed. 1356 (1940)." The Ninth Circuit Court of Appeals concluded that since military retirement pay could be prospectively altered by Congress, then the "vested rights" argument of the servicemen did not apply.

Because Appellant's rights were not "vested" in him by the *McCarty* decision, by Texas community property law or by federal military retirement law, Appellant's constitutionality issues of due process and separation of powers are without substance.

It is important to remind this Court of what is not at issue in this case. All military retirement payments affected by the lower Texas courts' decisions are payable after the effective date of the USFSPA, that is, February 1, 1983. The fact that the USFSPA retroactively affects payments beginning June 25, 1981, and any constitutional challenge to the Act so doing, is not an issue and is totally irrelevant to the facts in this case.

The speciousness of Appellant's position reaches a pinnacle on page 30 of his Jurisdictional Statement. Appellant, in essence, argues that since Appellee has gotten by so far without her portion of the retirement benefits, then why should Appellant have to change his economic lifestyle

now since he's come to depend upon the retirement benefits? Appellant equates a change in his lifestyle to a denial of due process of law. To borrow from Appellant's authority cited for his due process theory, legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976). Fortunately the appellate jurisdiction of this Court, as well as its discretionary certiorari jurisdiction, is not exercised on grounds of Great Expectations.

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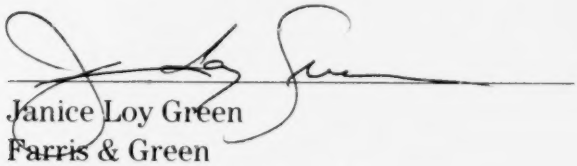
CONCLUSION

Wherefore, Appellee respectfully submits that Appellant's claims are so lacking in substance and merit as to be frivolous. Appellee respectfully moves this Court to dismiss this appeal or, in the alternative, affirm the court below and to deny any application for writ of certiorari.

Respectfully submitted,



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